SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

..... Term, 1968

No. [redacted] 171

BRICKLAYERS, MASONS & PLASTERERS' INTERNATIONAL UNION OF AMERICA, LOCAL 11, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IRVING KESSLER,
Attorney for Petitioner,
400 Executive Office Building,
36 Main Street West,
Rochester, New York 14614.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioner, BRICKLAYERS, MASONS & PLASTERERS' INTERNATIONAL UNION OF AMERICA, LOCAL 11, AFL-CIO, hereinafter referred to as the Union, respectfully prays that a Writ of Certiorari issue to review a decree of the United States Court of Appeals for the Second Circuit entered March 11, 1968, enforcing an Order of the NATIONAL LABOR RELATIONS BOARD, issued January 6, 1967 in a proceeding instituted against the Union pursuant to Section 10 (c) (e) of the National Labor Relations Act as amended.

History of the Case and Opinions Below

This case came before the United States Court of Appeals for the Second Circuit (hereinafter referred to as the Court below) upon petition of the NATIONAL LABOR RELATIONS BOARD (hereinafter called the Board) for enforcement of its Order issued January 6, 1967.

The Order followed the filing of charges by EUGENE MCCLAIN (hereinafter called McClain) upon which the Board issued its Complaint.

The Board's Decision Order adopted the findings of the Trial Examiner which found the Union guilty of violating Section 8 (b) (2) and (1) (A) of the National Labor Relations Act as amended (hereinafter referred to as the Act). The Board's decision is reported at 162 NLRB No. 58.

The Court below without opinion decreed enforcement of the Board's Order. The Court's decision is reported at

The decision of the Court below will remain final unless jurisdiction is taken by this Court.

Jurisdiction

The decree of the Court of Appeals was entered on March 11, 1968. The jurisdiction of the Court was invoked under 28 U.S.C. 1254 (1) and Section 10 (e) of the National Labor Relations Act as amended (29 U.S.C. 160 (e)).

Questions Presented

1. Whether a Union can be found guilty of an unfair labor practice under Section 8 (b) (2) and 8 (b) (1) (A) of the Act where there is no direct evidence that the Union or its agents intended or in fact did interfere with McClain's right of employment.

2. Is a Union guilty of restraining and coercing an employee from exercising his rights under Section 7 of the Act in violation of Section 8 (b) (1) (A) and 8 (b) (2) of the Act where a former Union member fails to pay a fine imposed by the Union for criminally assaulting an officer of said Union, which resulted in the other members of the Union refusing to work with the assaulting member, thereafter allegedly causing the said former member's loss of and failure to gain employment?

3. Whether McClain was a supervisor under Section 2 (11) of the Act and, therefore, excluded as an employee under Section 2 (3) of the Act and not entitling him to protection of the Act. (Where McClain was in charge of a job when his supervisor was not present and did other investigation for his employer (Chloris Associates Ltd.) and priced bids on various jobs for his said employer.)

4. Whether the Court decision below is erroneous and not substantiated by the facts and departs from the usual course of judicial proceedings or so far sanctions such departure by a lower tribunal as to call for an exercise of the Court's power of supervision.

Statutes Involved

National Labor Relations Act as amended (61 Stat. 136, 24 U.S.C. 151 *et. seq.*) set out in Appendix A *infra.*

Statement

The petitioner is a labor organization within the meaning of the National Labor Relations Act as amended. Eugene McClain was a member of the petitioner Union. McClain was dropped from the membership list in 1965 (App. pp 16-17, 46-47, 50-51) as a result of an altercation with James

Burke, the petitioner's business agent, during which McClain criminally assaulted Mr. Burke (App. pp. 16-17, 33-36). The altercation arising out of a conversation between McClain and Burke, during which Mr. Burke asked McClain when he was going to pay the money he owed the Union Pension Fund. It seems McClain was, at one time, in business for himself and employed union members. As a result of this employment, McClain was obligated to pay certain money to the Union Pension Fund, which he failed to pay. Based upon this altercation, charges were filed by three members of the Union against McClain. After a duly authorized Union meeting, McClain was given notice to appear at a proper union proceeding to determine the facts and what cause of action should be pursued. During said Union's proceeding, McClain was fined $1,000.00. Thereafter McClain failed to pay the fine and was, therefore, dropped from Union membership on approximately January, 1966 (App. pp. 16-17, 47-51).

On January 14, 1966, McClain's employer was engaged as a subcontractor in the Town House Motel. McClain reported to the job. Thereafter there was a work stoppage (App. pp. 15-16, 17-18, 42-43).

Again on January 25, 1966, after McClain appeared on a job at Strong Memorial Hospital in Rochester, certain members of the Union walked off the job. On both jobs, McClain was advised to leave, which he did. On the basis of these instances, the Board found petitioner violated Section 8 (b) (2) and 8 (b) (1) (A) of the Act by causing McClain to be discharged on January 14, 1966, and by causing the employer to refuse to hire McClain on January 25, 1966 (App. pp. 11-12, 27-30).

The Union was ordered to cease and desist and to pay any losses McClain may have suffered as a result of the

Union's act. This decision was affirmed by the lower Court without opinion.

Reasons for Granting the Writ

The decision below proscribes the enforcement of internal, union discipline against a member who has voluntarily joined the Union, committed conduct unbecoming a Union member and was therefore duly fired by said Union. The question involved is of national significance to management and labor alike. It is also of grave consequence to the system of collective bargaining developed under the National Labor Relations Act, striking at the heart of labor's capacity to act and responsible self-control. In the light of the manifest importance of the question presented, the review by this Court is clearly warranted.

The Court below erred in finding that there was an unfair labor practice where the record contained not one bit of direct evidence to demonstrate the Union's activity or that of its agents was designated to interfere with McClain's rights claimed under the Act. It is significant to note that the trial examiner states in his decision that the general counsel failed to establish the date of the Union meeting which was partially relied upon to establish the Union complicity in the alleged unfair labor practices (App. pp. 22-23). In fact, the records indicate that the masons left the job spontaneously, not because of McClain's loss of membership in the Union, but because McClain, as a former employer, owed Union Local 11's Pension Fund a sizable amount in delinquent contributions. Added to that, when asked to pay the delinquent amount, he assaulted the Union business agent and then when properly fined for his conduct by the Union, he failed to pay the Union fine. The Trial Examiner rests his decision on conversations which

only relate circumstantial evidence of what may have been the case.

It is respectfully submitted that the Trial Examiner in reaching his decision, relied in part upon irrelevant and highly prejudicial material as is indicated in Footnote 16 of his opinion "In recommending this broad cease and desist Order, I have also noted that the Board has previously found the Respondent to have engaged in similar unfair labor practices. * * *" (App. pp. 26-27).

The holding in this case that the Union is guilty of an unfair labor practice because the members of the Union refused to work with a man who was no longer a member (because of his refusal to pay a fine imposed for assaulting a man they elected to office) without any direct evidence of the Union or its agents ever sanctioning such conduct, that is deemed an unfair labor practice, will affect every Union in the United States. It is submitted that this case allow the National Labor Relations Board to find an unfair labor practice on the flimsiest amount of evidence.

The Court below misinterpreted Section 2 (11) of the Act in holding that McClain was not a supervisor. Section 2 (3) of the Act excludes supervisors from the definition of employee and thus excludes supervisor from protection under the portions of the Act applicable to this case. There is ample evidence given by the president of McClain's employer and at least one witness that McClain was frequently in charge of the job he was on, that McClain was consulted with regard to hiring of employees with no other supervision on the job and that McClain also estimated jobs and made recommendations as to building prices (R. 121). There was further testimony that at one of the very jobs where the unfair labor practices allegedly took place, McClain was to oversee the masonry work (R. 121-122).

Again when McClain's supervisor, the corporation president, was not around, McClain was contacted to see whether the masons were available to do a particular job (R. 12). The Board laid much weight on the fact that McClain received a salary equivalent to the other masons on the job. It is the Union's contention that the relevant consideration is not what he is paid, but what he is paid for. In this case supervisory work made up a large portion of his job.

Conclusion

The questions in this Case are important and recurrent ones in the administration of the Act. They are now ripe for adjudication by this Court. The said Writ for Certiorari should therefore be granted.

Respectfully submitted,

IRVING KESSLER,
Attorney for the Petitioner,
400 Executive Office Building,
36 Main Street West,
Rochester, New York 14614.

APPENDIX A

Statutes Involved

The relevant provisions of the National Labor Relations Act as amended (61 Stat. 136, 65 Stat. 601, 73 Stat. 519, 29 U. S. C. 151, *et seq.*) are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(à) (3).

Sec. 8. (a) It shall be an unfair practice for an employer—

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, that nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered

by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have credited that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, that no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(b) It shall be an unfair practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership thereon * * *.

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 2, subdivision (3) of the Act defines "employee" as follows:

> "(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

Section 2, subdivision (11) defined "supervisor" as follows:

> "(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

APPENDIX B

Decision and Order

On August 24, 1966, Trial Examiner John P. von Rohr issued his decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearings and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Relations Board hereby adopts as it Order the Recommended Order of the Trial Examiner, as modified below, and orders that the Respondent, Bricklayers, Masons & Plasterers' International Union of America, Local 11, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. Add the following as paragraphs 2(b) and 2(c) to the Trial Examiner's Recommended Order, and reletter the present paragraphs 2(b) and 2(c) as 2(d) and 2(e):

"(b) Make Eugene McClain whole for any loss of pay he may have suffered as a result of the discrimination against him, in the manner set forth in the section above, entitled 'The Remedy.'

"(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all records and reports and all other documents necessary to analyze the amount of backpay due under the terms of this Recommended Order."

Dated, Washington, D. C., Jan. 6, 1967.

FRANK W. McCULLOCH, *Chairman,*
HOWARD JENKINS, JR., *Member,*
SAM ZAGORIA, *Member,*

(SEAL) NATIONAL LABOR RELATIONS BOARD.

Errata

UNITED STATES OF AMERICA

BEFORE THE NATIONAL RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
Washington, D. C.

BRICKLAYERS, MASONS & PLASTERERS' INTERNATIONAL UNION OF AMERICA, LOCAL 11, AFL-CIO, (WILMORITE CONSTRUCTION INC., CHLORIS ASSOCIATES LTD., and JOHN LUTHER & SONS COMPANY INC.),

and

EUGENE MCCLAIN, An Individual.

Case No. 3-CB-909.

The Trial Examiner's Decision in the above-captioned case contains certain inadvertent errors which are hereby corrected as follows:

Page	*Line*	*Change*	*To*
2	28	Wilmorite	Luther
2	51	Wilmorite	Luther
2	54	Wilmorite	Luther
2	54	Luther	Chloris
2	58	Luther	Chloris
2	58	Wilmorite	Luther
2	61	Wilmorite	Luther

JOHN P. VON ROHR,
Trial Examiner.

Dated: August 31, 1966.

Trial Examiner's Decision

STATEMENT OF THE CASE

Upon a charge filed on February 14, 1966, the General Counsel for the National Labor Relations Board, for the Regional Director of the Third Region (Buffalo, New York), issued a complaint on March 25, 1966, against Bricklayers, Masons & Plasterers' International Union of America, Local 11, AFL-CIO, herein called the Respondent or the Union, alleging that it had engaged in certain unfair labor practices affecting commerce within the meaning of Section 8(b) (1) (A) and 8(b) (2) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. The Respondent thereafter filed an answer denying the commission of any unfair labor practices.

Pursuant to notice, a hearing was held in Rochester, New York, on May 16 and 17, 1966, before the undersigned Trial Examiner. All parties were represented by counsel and were afforded opportunity to adduce evidence, to examine and cross examine witnesses and to file briefs.[1]

Upon the entire record in this case, and from my observation of the witnesses, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS

I. The Business of the Companies Involved

John Luther & Sons Company Inc., hereinafter called Luther, is a New York corporation with its principal office and place of business located at Rochester, New York, where it is engaged as a general contractor in the building

[1] The General Counsel's unopposed motion to correct the record is hereby granted. The motion reflecting these corrections is contained in the formal files of this proceeding.

and construction industry. The parties stipulated that during the last year Luther purchased and received goods and materials valued in excess of $50,000 which were shipped and transported to it from points and places located outside of the State of New York.

Wilmorite Construction Inc., hereinafter called Wilmorite, is a New York corporation with its principal office and place of business located in Rochester, New York, where it is engaged as a general contractor in the building and construction industry. The parties stipulated that during the last 12 months, Wilmorite purchased and received goods and materials valued in excess of $50,000 which were transported and shipped to it from points and places located outside of the State of New York.

Chloris Associates Ltd., hereinafter called Chloris, is a New York corporation with its principal office and place of business located in Rochester, New York, where it is engaged as a masonry and concrete contractor in the building and construction industry. Thomas E. Kelley, secretary and office manager of John Luther & Sons Company Inc., credibly testified that during the period April 30, 1965, to April 26, 1966, Chloris performed services for Wilmorite valued at $29,330.06.[2]

I find that Luther, Wilmorite and Chloris are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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[2] The above includes the total value of goods and services furinshed by Chloris to Wilmorite. Kelley testified that approximately 10 percent of the above amount is withheld until the completion of the various jobs. However, during the above period, Kelley credibly testified that Wilmorite paid Luther by check the sum of $25,759.56 by check. The invoices upon which Kelley based his testimony were available at the hearing for examination. In addition to the foregoing, William Wilson, the president of Chloris, credibly testified that during the period mentioned above Luther performed services for Wilmorite valued in excess of $25,000. Wilson testified that he arrived at this figure by multiplying the amount he charges per square foot times the total amount of square footage he performed for Wilmorite during the above period.

II. The Labor Organization Involved

Respondent Bricklayers, Masons & Plasterers' International Union of America, Local 11, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Issues; Background*

The complaint alleges that the Respondent violated Section 8(b) (2) and 8(b) (1) (A) of the Act by causing or attempting to cause an employer to discharge employee Eugene McClain on January 14, 1966, and by causing or attempting to cause an employer to refuse to hire this employee on January 25, 1966.

McClain is a cement finisher by occupation and has been employed in this capacity by Chloris Associates, Inc., since 1952. Preliminarily, I shall dispose of the question raised by the Respondent as to McClain's possible status as a supervisor within the meaning of the Act. The only evidence in this regard is testimony reflecting that on occasion McClain is assigned to "oversee" a job when William Wilson, the president of Chloris, is temporarily off the jobsite. However, the evidence reflects that on these occasions McClain's function is limited to routine direction of the work, such as telling the men where to start. Of the five-eight masons employed by Chloris, at least three others (Barkley, James Minter and Paul Minter) are utilized by Wilson to oversee jobs in the same manner as McClain.[3] Aside from this routine direction of work, there is no evidence to reflect that McClain is vested with any of the supervisory indicia as provided in Section 2(11) of the Act. Indeed, McClain is paid at the same hourly rate as

[3] The uncontroverted and credited testimony of Wilson.

the other masons, this as provided in the current collective bargaining agreement between Chloris and Respondent Local 11. In view of all the foregoing, it is clear, and I find, that McClain is an employee, not a supervisor within the meaning of the Act.

McClain became a member of the Respondent Union in 1962. An incident which resulted in McClain's losing his membership in the Union occurred on October 21, 1965 during the course of an argument between McClain and James Burke, the Respondent's business agent. The argument concerned a dispute as to the amount of money owed by a partnership, of which McClain had been a partner, to the Union's pension fund.[4] It is undisputed that this argument culminated with McClain striking Burke with his fist. For this he was ultimately found guilty of third degree assault. In addition, however, three members of the Union filed charges against McClain at a union meeting held on October 22, 1965. A union proceeding based upon these charges was held on November 12, 1965, and at this time the Respondent imposed a fine upon McClain in the sum of $1000. McClain did not pay the fine and he was dropped from the membership of the Respondent in about the middle or latter part of December, 1965.[5]

B. *The Discrimination Against McClain at the Town House Motel Project*

During the period relevant hereto, Wilmorite Construction Inc., was the general contractor on a construction project of the Town House Motel in Rochester, New York. Chloris was engaged by Wilmorite as a subcontractor for

[4] McClain testified that this partnership became defunct in 1960 or 1961.

[5] Burke, who testified concerning this matter, did not give the exact date on which McClain was dropped from membership. He testified that "he was dropped from the rolls of Local * * * 35 to 40 days after his trial." McClain did not attend the November 12 meeting.

installation of the flat cement. As a member of the Building Trades Employers Association of Rochester, Wilmorite is party to a collective-bargaining agreement between the Association and the Respondent Union. Chloris is a party to the same agreement.[6]

The alleged violation on January 14, 1965, occurred when McClain on this date reported to work (for the first time) at the Town House project. Since there is some variation as to exactly what was said by the various participants to the dispute which occurred at this time, I turn first to the version given by Bruce Bart, the Respondent's job steward on his job. Bart testified that when he arrived on the job at about 8 a. m. the bricklayers and masons, members of the Respondent, told him that they would not go to work because McClain, who was not a member of the Respondent, was on the job. Bart said that he advised the men to start work and that he would try to "straighten out" the trouble. Continuing, Bart said that he thereupon made two telephone calls, the first to James Burke, the Respondent's business agent, and the other to the International Union at Washington, D. C., but that he did not succeed in reaching either of the parties. Bart testified that he then went up to each of four or five groups of the employees, who were standing in groups of two, and advised them of his telephone efforts. Bart said that the employees in each group told him that they still did not want to work with McClain but that they would use up the mortar until noon. Bart then spoke to Fred Russell, the general superintendent for Wilmorite. According to Bart, he told Russell that "the men chose not to work on the same job with Mr. McClain, because he was not a member

[6] The undisputed testimony of Wilson, president of Chloris. Wilson did not indicate whether or not Chloris was a member of the Association or whether Chloris became a party to the contract by private agreement with the Respondent. The contract is effective from May 1, 1964, to April 30, 1967, and it contains a union security clause which is not at issue herein.

of Local 11." Pressed further about this conversation, Bart added that he also told Russell that he had called the Local and the International Union * * * and that the men would use their mortar until noon, then they would go home.

Concerning the above conversation, Russell testified that he sought out Bart after the mason superintendent reported to him that there was a problem with the bricklayers. According to Russell, he located Bart and Bart told him that "he (Bart) had been in touch with the International and Local Union and that he was under orders to notify Wilmorite that [the bricklayers] would use the mortar that was on the job and work until noon, because Mr. McClain was on the job and he was no longer considered a member of the Union * * * he said that McClain had been fined by the Union and he had to pay his fine."[7]

From my observation of the witnesses, I am inclined to credit Russell's version of the above conversation over that of Bart. Although Bart testified that he advised Russell that he made telephone calls to the Local and to the International, he did not testify that he also told Bart that he did not complete either of these calls. I have no doubt that Bart also advised Russell that the men would not work with McClain for the reasons indicated. However, and in any event, I am convinced and find that Bart did not impart to Russell the message that the men's refusal to work with McClain was predicated upon the individual decision of each of these employees. Rather, I am persuaded and find that Bart simply made it known to Russell that McClain had been fined, that he was no longer a member of the Union, and that a work stoppage would ensue unless McClain was removed from the job.

[7] On cross examination Bart acknowledged advising Russell that McClain had been fined. He said, "I told him that's what the men based their reason for not wanting to work."

It is undisputed that Russell and Bart spoke to McClain after the above conversation. Although there is some variance in the testimony as to the sequence of events which followed (*i.e.*, whether Russell spoke to McClain before Bart entered the conversation) there is no substantial dispute as to the essence of what transpired. McClain impressed me as a credible witness and his testimony concerning this matter was more detailed than that of Bart and Russell. Having considered all the testimony, and from my observation of the witnesses, I am persuaded that McClain had the best recollection and I credit his version. Thus, McClain testified that about 9 a. m. he was asked to report to Russell, who was in another room in the basement of the building where the men were working. Russell began by asking if he was having trouble with the Union in regard to his payment of dues. McClain replied that his dues were paid to December 31 and gave evidence of this fact by displaying his union book to Russell. When Russell thereupon stated, "Well, something is wrong," McClain suggested that he call Bart. Russell did so and Bart appeared. McClain said that he asked Bart "what was the trouble." Bart responded that he had been fined by the International and the Local, that he had not paid the fine and that he could not work on the job. Bart added, according to McClain, that he was "just doing his job." According to the credited testimony of McClain, Russell thereupon asked that he leave the job until he got "straightened out" with the Union.[8] Upon being so ad-

[8] Russell testified that at this point he told McClain "I don't like this. Why don't you go and get it straightened out." Concerning the same aspect of this conversation, it was Bart's testimony that Russell told McClain, "Gene, I wish you would get this straightened out." As indicated, I credit McClain's version as set forth above. However, even accepting the version of either Russell or Bart, my ultimate conclusions herein would not be effected. Thus, assuming that Russell merely told McClain to go and get the matter straightened out, I would still find, under all the circumstances herein, that any such statement effectively conveyed to employee McClain the message that he was not to remain on the job until he cleared his difficulties with the Union.

vised, McClain left the area and sought out William Wilson, the president of Chloris, who was on the job. McClain related the entire conversation which he had had with Bart and Russell, including the fact that Russell had asked him to leave the job. Wilson responded by saying that it was best that he leave and McClain promptly left the premises. He was at no time thereafter employed at the Towne House project.

C. *Discussion and conclusions*

Although the Respondent has not explicated its defense to the allegations in the complaint, I gather from statements of Respondent's counsel at the hearing that apparently it is Respondent's contention that Bart, the Union's steward, lacked the authority to demand McClain's removal from the job. In finding no merit to this defense, I turn now to the testimony to Kurt Keller, the latter also a job steward of the Respondent Union. Keller proved to be a recalcitrant witness, particularly when queried by the General Counsel with respect to statements made by Business Agent Burke at a union meeting held in January, 1966. He was finally confronted with his pretrial affidavit in which he made the following statement:

> "At the regular Union meeting, I think it was in January, James Burke, Business agent, read us a letter from the International Union. Burke told us that McClain had hit him and McClain had been thrown out of the Union. He stated that he had sued McClain for a thousand dollars and had thrown him out of the union. *He told us that as soon as McClain came on the job that none of us, the Masons, should work.* I was left with the understanding that if McClain came on the job, I was supposed to pull them men off." (Italics supplied.)

Although Keller at first gave evasive and confusing answers when queried about the above statement, he finally conceded: (1) that the statement set forth above in fact was the statement which he gave to the Board agent who took the affidavit, and (2) that the statement in fact was his recollection of the events related therein at the time he gave the affidavit to the Board agent. In view of all the foregoing, including my observation of Keller, and the further significant fact that Burke did not deny having made the statements thus attributed to him by Keller,[9] I am satisfied and find that Burke, at a union meeting held in January, 1966, instructed the Respondent membership to engage in a work stoppage, or to threaten to take such action, at any time that McClain became employed on a project on which the Respondent member-employees were working. In view of these instructions by Burke, it is abundantly clear that the Respondent must be held responsible for the threatened refusal to work unless McClain was removed from the job. Not only did the Union thereby authorize and sanction the action of Job Steward Bart,[10] but indeed it thereby cannot disassociate itself from any refusal by the employees themselves not to work with McClain.[11] One further point is in order. Keller did not

[9]Burke was called as a witness by the Respondent after Keller had testified.

[10] Even absent Burke's instructions to the membership at the January meeting the law is settled that a union is bound by the actions of a steward who has apparent authority, even if he does not have real authority, to act. *N. L. R. B. v. International Brotherhood of Teamsters, Local 249*, 249 F. 2d 83, 84 (C. A. 3); *N. L. R. B. v. International Brotherhood of Teamsters, Local 182*, 228 F. 2d 83, 84 (C. A. 2). See also *New Power Wire & Electric Co. v. N. L. R. B.*, 340 F. 2d 71 (C. A. 2). That the Respondent's stewards performed the customary duties and possessed the usual authority of union job stewards is evident from the following testimony of Steward Keller, who said: "I had the right to check the job. I am steward for everything on that day." The Board has held that such authority is sufficient to establish the stewards as responsible agents of the Union which they represent. *Local No. 511, International Brotherhood of Carpenters & Joiners of America, AFL-CIO (New Mexico General Contractors)*, 120 NLRB 1658.

[11]*Cf. Local 13, United Association of Journeyman and Apprentices, et al. (Grover Transitubes of Michigan, Inc.)*, 146 NLRB 1134.

give the exact date of the union meeting which was held in January, 1966. Thus the General Counsel has not established that this meeting in fact was held prior to January 14, 1966. However, even if it be assumed that the meeting was held subsequent to the incident in question, it is clear that Burke's statements and conduct at this meeting ratified and adopted the action of the steward and the employee-members which led to McClain's removal from the Towne House job.[12]

There remains for reconsideration the question as to whether the Union-instigated termination of McClain was unlawful under the Act. McClain's membership dues were paid up to December 31, 1965. On January 25, 1966, McClain sent a letter to the Respondent enclosing a check for the full amount of his dues. The Respondent refused to accept this tender and returned his check. McClain testified without contradiction that union members are permitted a 60-day grace period within which to pay dues. Accordingly, it is clear that McClain was not delinquent when he tendered his dues to the Respondent on January 25, 1966. Moreover, Burke conceded that McClain's expulsion from union membership was not at all related to union dues, but was based solely upon that fact that McClain had not paid the fine which the Union had imposed on him. It is well settled that it is unlawful for a union to cause or attempt to cause an employer to discriminate against an employee by reason of a violation by an employee of an internal rule or policy relating to the acquisition or retention of membership.[13] "The Act will not countenance any form of discrimination in the hire, tenure, or other term or condition of employment which turns on the union

[12] See *Local 299, International Brotherhood of Teamsters (Roadway Express)*, 150 NLRB 43.

[13] *A. Nabakouski Co.*, 148 NLRB 876.

membership status of the employee involved, except by operation of valid union-security provisions in the parties' contract." *Roadway Express, Inc., et al.*, 150 NLRB 43. Accordingly, I find that by causing Chloris to terminate McClain's employment at the Towne House job, the Respondent violated Section 8(b) (2) and (1) (A) of the Act.[14]

D. *The discrimination against McClain at the Strong Memorial Hospital job*

There is no dispute as to the material facts relating to the allegation that the Respondent caused an employer to discriminatorily deny employment to McClain on a job involving the construction of an addition to the Strong Memorial Hospital at the University of Rochester. John Luther & Sons Company, Inc., was the general contractor on this job. As a member of the Building Trades Employer Association of Rochester, Luther also was party to the heretofore mentioned collective-bargaining agreement with the Respondent Union.

Preliminarily, it may be noted that although McClain normally worked as an employee of Chloris, there were occasions when Luther hired McClain (and apparently other of Chloris' employees) as its own employee. On these occasions McClain was paid directly by Luther at the regular hourly rate.

Several days prior to January 25, 1966, Joseph Panello, the job superintendent for Luther, requested McClain to report to the Strong Memorial job, stating that he had

[14] I recognize that Bart spoke to Russell, the general superintendent of Wilmorite, rather than to Wilson, the president of Chloris who was McClain's employer. However, under all of the circumstances herein, including the fact that McClain promptly apprised Wilson of his conversation with Bart and Russell and that Wilson acquiesced in Russell's direction that McClain remove himself from the job, I find that Respondent thereby effectively caused Chloris to terminate McClain in violation of the Act.

some rubbing work for him to do. McClain reported to the jobsite on the morning of January 25 for the purpose of obtaining this employment. The events which transpired when McClain arrived on the jobsite were admitted by Kurt Keller, the union steward on this job. Thus, Keller testified that upon observing McClain on the job he sought out the other mason employees, members of the Respondent Union, and told them "Listen, McClain is on the job. Let's clean upon the job and go in the shanty." Keller said that he thereupon telephoned Business Agent Burke, advised him of the action he had taken, and that Burke responded by saying, "You did the right thing."

As soon as Job Superintendent Panello learned that the masons had walked off the job he went up to Keller and asked for an explanation. Keller testified that he responded by telling Panello, "McClain is on the job. I took the masons off." Panello said that he thereupon found McClain and told him, "You better leave the job to avoid a lot of this trouble." McClain then departed. The violation by the Respondent in this instance is so clear that no elaboration is necessary. Accordingly, and for the same reasons set forth with respect to the violation found in the preceding section,[15] I find that the Respondent caused Luther to refuse to employ McClain at the Strong Memorial Hospital job on January 25, 1966, in violation of Section 8(b) (2) and (1) (A) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of Wil-

[15] In addition to Burke's statements at the January Union meeting (which admittedly was held prior to January 25) the Union's responsibility in this instance was clearly manifested by Burke's statement to Keller that he did "the right thing" by pulling the men off the job as soon as McClain appeared.

morite, Luther and Chloris, set forth in section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and such of them as have been found to constitute unfair labor practices tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(b) (1) (A) and (2) of the Act, it will be recommended that Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent Union unlawfully caused Wilmorite and Chloris to discharge Eugene McClain, and having further found that the Respondent unlawfully caused Luther to refuse to employ McClain, I shall recommend that Respondent be required to notify Wilmorite, Chloris and Luther, in writing, that it has no objection to the employment of Eugene McClain and that it simultaneously serve copies of such notices on McClain. In addition, I recommend that Respondent be required to make McClain whole for any loss of earnings he may have suffered by reason of the discrimination against him by payment to him of a sum of money equal to that which he normally would have earned in the employ of the Companies, absent any discrimination, less his net earnings during the periods he would have been so employed. Backpay shall be computed with interest on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Because of the character and scope of the unfair labor practices engaged in by the Respondent, I will recommend that it cease and desist from in any other manner interfering with, restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.[16]

Upon the basis of the foregoing findings of fact and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Wilmorite, Chloris and Luther are employees engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By causing Wilmorite and Chloris to discharge Eugene McClain because of his union membersip status, and by causing Luther to refuse to employ Eugene McClain because of his union membership status, the Respondent has violated Section 8(b)(1)(A) and (2) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I recommend that Respondent Bricklayers, Masons & Plasterers' International Union of America, Local 11, AFL-CIO, its officers, agents, successors and assigns, shall:

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[16] In recommending this broad cease and desist Order I have also noted that the Board has previously found the Respondent to have engaged in similar unfair labor practices. *Local 11, Bricklayers, Masons and Plasterer International Union of America, AFL-CIO (Cooper and Craib, Inc.)*, 144 NLRB 373.

1. Cease and desist from:

(a) Causing or attempting to cause Wilmorite Construction, Inc., John Luther & Sons Company, Inc., and Chloris Associates Ltd., or any other employer, to discriminate against Eugene McClain, or any other employee, with respect to his hire, tenure or any other term or condition of his employment for reasons related to his membership status in Respondent Union.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Notify Wilmorite Construction Inc., John Luther & Sons Company Inc., Chloris Associates Ltd., respectively, in writing, that it has no objection to the employment of Eugene McClain. Copies of said notices are to be simultaneously served upon McClain.

(b) Post at its offices and meeting halls in Rochester, New York copies of the attached notice marked "Appendix."[17] Copies of such notices, to be furnished by the Regional Director for the Third Region, shall after being duly signed by an authorized representative of the Respondent, be posted immediately upon receipt thereof, and main-

[17] In the event that this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of the United States Court of Appeals, the words, "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

tained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced or covered by any other material.

(c) Notify the said Regional Director in writing within 20 days from the date of this Decision and Recommended Order what steps Respondent has taken to comply therewith.[18]

Dated at Washington, D. C.

JOHN P. von ROHR
Trial Examiner

APPENDIX

NOTICE

TO ALL MEMBERS OF BRICKLAYERS, MASONS & PLASTERERS' INTERNATIONAL UNION OF AMERICA, LOCAL 11, AFL-CIO

PURSUANT TO THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE NATIONAL LABOR RELATIONS BOARD and in order to effectuate the policies of the NATIONAL LABOR RELATIONS ACT

(AS AMENDED)

we hereby notify you that:

WE WILL NOT cause or attempt to cause WILMORITE CONSTRUCTION INC., JOHN LUTHER

[18] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

& SONS COMPANY, INC., CHLORIS ASSOCIATES LTD., or any other employer, to discriminate against EUGENE McCLAIN, or any other employee, in violation of Section 8(a)(3) of the National Labor Relations Act.

WE WILL NOT in any other manner restrain or coerce employees in the exercise of rights guaranteed by Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

WE WILL make EUGENE McCLAIN whole for any loss of pay he may have suffered as a result of the discrimination against him.

WE WILL notify WILMORITE CONSTRUCTION INC., JOHN LUTHER & SONS COMPANY, INC. and CHLORIS ASSOCIATES LTD. that we have no objection to the employment of EUGENE McCLAIN, and we will serve him a copy of such notice.

BRICKLAYERS, MASONS & PLASTERERS' INTERNATIONAL UNION OF AMERICA, LOCAL 11, AFL-CIO
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If members have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 4th Floor, The 120 Building, 120 Delaware Avenue, Buffalo, New York 14202 (Tel. No. 842-3100).

Decree

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BRICKLAYERS, MASONS & PLASTERERS' INTERNATIONAL UNION OF AMERICA, LOCAL 11, AFL-CIO,

Respondent.

No. 31,792

Before: Waterman and Feinberg, *Circuit Judges,*
Bartels, *District Judge.*

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for enforcement of a certain order issued by it against the Respondent on January 6, 1967. The Court heard argument of respective counsel on February 6, 1968, considered the briefs and transcript of record filed in this cause and being fully advised in the premises granted full enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Bricklayers, Masons & Plasterers' International Union of America, Local 11, AFL-CIO, its officers, agents, and repre-

sentatives abide by and perform the direction of the Board in said order contained.

STERRY R. WATERMAN,
Judge, United States Court of Appeals for the Second Circuit,

WILFRED FEINBERG,
Judge, United States Court of Appeals for the Second Circuit,

JOHN R. BARTELS,
By WF,
District Judge, United States District for the Eastern District of New York, sitting by designation.

FILED: March 11, 1968.
A true copy.
/s/ A. Daniel Fusaro,
Clerk.

APPENDIX C

[1] **Excerpts from Stenographic Transcript of Testimony at Hearings of May 16 and May 17, 1966.**

[29] EUGENE McCLAIN, was called as a Witness by and on behalf of Counsel for the General Counsel and, being first duly sworn, was examined and [30] testified as follows:

Direct Examination:

Q. (By Mr. Arrigo) State your full name. A. Eugene McClain.

Q. Your residence address? A. 148 Hawley Street, Rochester.

Q. Mr. McClain, what is your occupation? A. Cement finisher.

Q. How long have you been engaged in that occupation? A. Since 1952.

Q. And are you employed by Chloris Associates? A. Yes.

Q. How long have you worked for Chloris? A. About two and a half years.

Q. Had you worked for other employers during the same period? A. Yes, I have.

Q. Will you name some of them? A. John Luther & Sons. William Massareva.

Q. What kind of work did you do for them? A. Cement finisher.

Q. Are you a member of the Local 11 Union? A. I was.

Q. How long had you been a member? A. Since 1952.

Q. Until when? [31] A. Until January 14, 1966.

Q. Did you ever own and operate your own business, Mr. McClain? A. Yes.

Q. What kind of business was it? A. Cement finishing. Flat work.

Q. Did you work at the business yourself? A. I had a partner.

Q. Who was your partner? A. James Barkley.

Trial Examiner: James who?

The Witness: Barkley.

Q. (By Mr. Arrigo) For how long did you operate that business? A. Until '60 or '61.

Q. On or about October 25, 1965, were you working at the Xerox job site? A. Yes.

Q. And who were you working for? A. Chloris Associates.

Q. Who was the general on that job? A. Wilmorite Construction.

Q. At the time, did you have a conversation with Mr. James Burke? A. I did.

[32] Q. Do you know who he is? A. Who he is?

Q. Yes. A. Business Agent for Local 11.

Q. Tell us what took place on October 25, 1966, at the Xerox job site, between yourself and Burke? A. Me and Mr. Burke had a conversation.

Trial Examiner: About what time of the day was it? Where did this conversation take place and about what time of day was it?

The Witness: This was at the Xerox job over on Jefferson Road. It was about ten or ten-fifteen.

Trial Examiner: Was this on the job?

The Witness: Yes.

Mr. Hirsch: What day was this?

The Witness: October 25.

Trial Examiner: Was anyone else present during this conversation?

The Witness: Yes, there was.

Trial Examiner: Who else?

The Witness: I don't know whether or not they heard it.

Trial Examiner: Was anyone close enough to participate or overhear the conversation, that you know of?

The Witness: I don't think so.

Q. (By Mr. Arrigo) What took place? [33] A. We were discussing some back pension fund that we owed when Barkley and myself was in partnership.

Trial Examiner: This fund that you're talking about, pension fund, is that something that you and Barkley owned at the Union?

A. Yes.

Q. Contributions that you should have made; is that correct? A. That is correct.

Q. Go ahead. A. And he said one thing and I said another—

Mr. Hirsch: I am going to object unless the Witness says in words or substance what Mr. Burke said and what Mr. McClain said.

Trial Examiner: Let me say this: We would like you to give us the entire conversation, as best you can recall it. What he said to you and what you said to Mr. Burke. Please speak loud and clear so that we can all hear you.

The Witness: Well, Mr. Burke asked me when was I going to pay the back pension fund that I owed. So, I told him that my attorney told me not to pay any more until the Union got going with him and told us how much it was. So then, Mr. Burke said, "How much do you think you owe?" So I said, "Forty to Fifty dollars." So Mr. Burke said, "Forty or Fifty dollars my ass. You know damm well that you and Mr. Barkley owe Thirteen or Fourteen Hundred dollars a piece." So at [34] that time he was cussing me and I was cussing him and I struck him.

Trial Examiner: You did what?

The Witness: I struck him.

Q. (By Mr. Arrigo) Now, on January 14th, 1966, were you—

Trial Examiner: Before we finish this—incidentally, you hit him, you said?

The Witness: Yes.

Trial Examiner: What occurred then? Was that the end of it? Did you walk away or was anymore said.

The Witness: There was nothing else said. I walked away then. Yes.

Q. (By Mr. Arrigo) On January 14th, 1966, were you working on the Towne House project? A. Yes.

Q. And who was the general contractor on the job? A. Wilmorite Construction.

Q. Who were you working for? A. Chloris Associates.

Q. Were you doing some cement finish work? A. Yes, I was.

Q. Who was the Steward for the Bricklayers' Local 11? A. Bruce Bart.

Q. What took place that day?

* * *

[35] Q. (By Mr. Arrigo) Did you have any conversations with anyone from Wilmorite or from the Union concerning your work status or your employment status? A. Yes.

Q. Will you tell us with whom? A. Mr. Fred Russell.

Q. And what happened at that time?

Trial Examiner: Who is Fred Russell?

The Witness: Job Superintendent for Wilmorite Construction.

Q. (By Mr. Arrigo) Where were you at the time? A. We were just getting ready to pour concrete in the addition of the Towne House Motel.

Trial Examiner: And what time of day was this?

The Witness: Around 8:45 or 9:00 o'clock in the morning.

Q. (By Mr. Arrigo) Yes. A. Someone came in and said that Mr. Russell wanted to see me in the other room. So, I went out and Mr. Russell asked me—

Trial Examiner: Where was Mr. Russell then?

The Witness: He was in the basement too, but in another room. He was in another room.

Trial Examiner: You spoke to him alone, did you?

[36] The Witness: I don't remember whether anyone was there or not. So, he asked me why was I having trouble with the Union about something—about my dues. So, I had my Union book and my dues was paid up until December the 31st. So, I showed him my book and he said, "Well, something is wrong." He says, "I don't know what it is." So, I suggested to him that he call Bruce Bart, the Steward for Local 11, down. So, I don't know whether he sent someone after Mr. Bart or not but anyway, he came down. And I asked Mr. Bart what was the trouble. So he said that I had been fined from the International and Local 11 that I had been fined and didn't pay the fine and Mr. Bart told me, "I am just doing my job." Then I forget who it was, Mr. Russell or William Wilmot, one or the other asked me to leave the job until I could get myself straightened out with the Union.

Trial Examiner: Who was the other?

The Witness: William Wilmot.

Trial Examiner: Who is William Wilmot?

The Witness: President of the Wilmorite Construction.

Q. (By Mr. Arrigo) Did that conclude your conversation with Mr. Russell? A. Yes. One of the others asked me to leave the job. So I went in the basement with Mr. Wilson who was working—

Q. Who is Mr. Wilson? A. He is the owner of Chloris Associates.

[37] Q. Did you have a conversation with him? A. Yes, I did.

Q. What was said during this conversation with Mr.

Wilson? A. I told him what had been said to me. He told me to leave the job and try to get myself straightened out.

Q. You told him what had been said between yourself and Mr. Bart and Mr. Russell? A. Yes, I did.

Q. Did you then leave the job? A. Yes, I did.

Q. Did Mr. Bart, during your conversation with him, give you any indication as to where he got this information? A. He did not.

Q. Did you ever work as mason on that job site again? A. No, I didn't.

* * *

Q. Now, you had then been paid up until January of '66; is that correct? A. Yes. December 31st, '65.

Q. When did you last send in your dues?

* * *

[38] Q. (By Mr. Arrigo) When did you last send in your dues? A. Around January the 25th, 1966.

Q. And did you receive a receipt? A. I received the check back and the letter that I wrote.

* * *

Q. (By Mr. Arrigo) Prior to that time, when did you pay your dues? A. Oh, around June or July, 1965.

Q. And for how long did you pay? A. Six months.

Q. Now, on January 25th, 1966, did you have occasion to be at the Strong Memorial job site? A. Yes.

Q. Approximately what time were you there—did you get there? A. Around ten minutes after eight, quarter after.

Q. Did you explain who was the general on the job? A. John Luther & Sons.

Q. And was Chloris working there? A. Yes, I think they was.

Q. You think they were? [39] A. Yes.

Q. And how did it come about that you were present on the job site? A. Well, I went back to see Joe Panello.

Q. Who is Joe Panello? A. Superintendent for John Luther & Sons.

Q. For the job site? A. Yes. And at the time I arrived, I didn't see Joe at the time.

Q. You were going to have a conversation with Joe Panello? A. Yes.

Q. For what purpose? A. Well, I wanted to see him—

Mr. Hirsch: I object to this. This goes to what his purpose was as to why he was on the job.

Trial Examiner: I think he may testify to why he went to the job.

The Witness: I was going to see Joe about some rubbing, some ceiling and some walls.

Q. (By Mr. Arrigo) Rubbing some ceilings and walls? A. Yes.

Trial Examiner: What do you mean? What did you want to see him about?

The Witness: He told me two or three days before he asked me if I could give him a couple of men to do some [40] rubbing. And he asked me if I wanted to do some rubbing.

Trial Examiner: You have testified that you went to the job to see Mr. Panello because you wanted to see about doing this work on the job for him?

The Witness: Yes.

Trial Examiner: Tell us what took place then?

The Witness: At that time, Mr. Panello left the office so I went in and went upstairs and Chloris Associates had two or three men working there. I don't remember how many men there was. And they asked me about a chalk line that had been snapped through to cut the floors.

Q. (By Mr. Arrigo) Who asked you? A. One of the men. I don't remember who it was that asked me for it.

Trial Examiner: What did he want?

The Witness: A chalk line, chalk line to snap a line in the floor where they were doing some cutting with a concrete saw. So, I thought I had one in the car, I told them I would go see.

Trial Examiner: Is that some sort of a tool, is it?

The Witness: Yes, it is a string with coloring on it. And I didn't have one in the car. I lived four or five blocks from the job site, so I went home to see if I had one there. I didn't have one there, so on my way back I went past a hardware, and went in and bought a chalk line and took it back [41] and gave it to him. James Minter, I think he was. One of the men that was working for Chloris at the time. And then, while I was standing up there, talking, some Mason, who I don't know who he was, said,—

* * *

The Witness: So, some Mason told me that all the Masons were leaving the job. So, I went down to the sixth floor where Mr. Kurt Keller was.

Q. (By Mr. Arrigo) Who is Mr. Keller? A. He is the Steward for Local 11.

Q. On the job site? A. Yes. And I asked Mr. Keller why was all the Masons leaving the job. So, he said, "Because you're on the job." "I am not working with tools." He said that doesn't matter. "You can't even be on the job site." So, about that time I saw Mr. Joe Panello come up the stairs so I said, "Joe, come here, I want you to hear this." So, I called him and asked Mr. Keller the same thing. He said, "He can't even be on the job site." So,

at that time, this fellow, I don't know him, he's a Brick Mason, this same fellow told me—

* * *

[42] The Witness: The same fellow that told me that the Masons were leaving, he said, "We don't mean that he can't be on the job site. Just can't work with Mason tools." So, at that time, Mr. Panello—

Trial Examiner: Who was present when that man spoke to you?

The Witness: Mr. Panello.

Trial Examiner: Just he?

The Witness: Yes. I don't think—I don't think anyone else was around.

Trial Examiner: Was Kurt Keller still there?

The Witness: Yes, he was. So, Mr. Panello was there and he said "Well, all of you get off the job." He said, "Take all the Masons and go home. I closed the job up." That is the time this fellow said, "I don't mean that Mr. McClain can't be on the job site. We just don't want him working with Mason tools." So then Joe gave the Masons five minutes to get back up and start on the job and he told me to go and see if I could get straightened out with the Union. And I left.

Q. (By Mr. Arrigo) What did Mr. Panello say to you? A. He told me to go see my lawyer. See if I could get myself straightened out with the Union.

Q. Did you talk to Mr. Wilson that day? [43] A. I don't remember whether Mr. Wilson was on the job or not, that day.

Q. Thereafter, have you worked for Wilmorite, Luther, Chloris, on any Union job, as a Mason? A. No.

* * *

[86] Mr. Arrigo: I call Mr. Fred Russell. Whereupon,

FRED RUSSELL, was called as a Witness by and on behalf of Counsel for the General Counsel and, being first duly sworn, was examined and testified as follows:

Direct Examination:

Q. (By Mr. Arrigo) Mr. Russell, will you state your full name? A. Fred Russell.

Q. How long have you worked for Wilmorite? A. About two years this coming July.

Q. And what is your job title? A. General Superintendent.

Q. Would you please briefly give us your duties with respect to responsibilities and authority? A. Well, I control the process of proceeding with the construction of buildings—

Trial Examiner: I take it he's the General Superintendent.

Mr. Arrigo: All right.

[87] Q. (By Mr. Arrigo) On the Town House job site, Wilmorite was the general contractor; is that correct? A. Yes, sir.

Q. And how many subcontractors were on the job site? A. Oh, probably six to ten.

Q. Has Wilmorite hired any Masons themselves? A. Oh, yes.

Q. Directly employed by Wilmorite? A. Yes.

Q. On the job site? A. Yes.

Q. Now, the Town House job, is that an addition to a Motel? A. Yes.

Q. And how many rooms were being added? A. Sixty-eight.

Q. What is the value of the job to the contractor? A. About Six hundred thousand.

Q. Now, in January, 1966, who was the Mason Steward on the job site? A. Bruce Bart.

Q. Do you recall how long he was Steward on the job site? A. Around—I am quite sure he was Steward until the Mason work was completed.

Q. When was that, approximately? A. Probably the week of April the 10th, somewhere around there.

[88] Q. When did Mr. Bart begin to work on the job site? A. I would think it would be around October 1st, after the footings were put in.

Q. 1965? A. Yes.

Q. And was he employed throughout the period from October, '65 to March, 1966? A. Yes.

Q. On January 14th, 1966, did you have a conversation with Mr. Bart? A. Yes.

Q. Where did the conversation take place? A. My first conversation with him took place outside the building, on the job site.

Q. And do you recall the time of day this was? A. I would say it was—must have been around nine-thirty.

Q. And how did the conversation come about? A. Well, I arrived on the job and Mr. Cortella, our Mason Superintendent, said there was a problem with the Bricklayers. I said, "Where is the job Steward? I would like to talk to him." And that is how it came about.

Q. Did you then talk to Mr. Bart or the Mason Steward, Mr. Bart? A. Yes, I did.

Q. What took place in the conversation? [89] A. He wasn't there at the time, but I waited until he returned and said that he had been in touch with the International and the Local Union and that he was under orders to notify Wilmorite that he would use the mortar that was on the

job and work until noon, because Mr. McClain was on the job and he was no longer considered a member of the Union.

* * *

Trial Examiner: In other words, was that all he said?

The Witness: That is all he said.

Trial Examiner: Just a moment, while I am on this. Well, normally, would you have worked later than noon?

The Witness: Oh, yes.

Trial Examiner: All right.

Q. (By Mr. Arrigo) Did he say what would happen after noon? A. Beg your pardon?

Q. Did he say what would happen after noon? A. No, he didn't.

Q. Did he say why the men would use up the mortar and work until noon?

Mr. Hirsch: I object to this, unless the Witness wants to state what the conversation was.

Trial Examiner: Is that all that was said, what you have just given us; is that right?

The Witness: Yes.

[90] Mr. Arrigo: I think it is a perfectly good question to ask. Did you ask why Mr. Bart said the men would work until noon?

Trial Examiner: I take it he did not say why. Because he has related the entire conversation. Is that correct?

The Witness: That is correct. But, in my statement, I think I said why.

Q. (By Mr. Arrigo) Did he say why? Did Mr. Bart say why?

* * *

Mr. Arrigo: Did he mention the word fine?

The Witness: Yes.

Q. (By Mr. Arrigo) What did Mr. Bart say about fine? [91] A. He said that Mr. McClain had been fined by the Union and he had to pay his fine.

Q. He said this at the time he was telling you about the other Masons not working until noon? A. Yes.

Trial Examiner: That is something else he told you at that time?

The Witness: Yes.

Trial Examiner: Is there anything else that you recall that he may have said at that time, if anything?

The Witness: No, I think that covers it.

* * *

Q. (By Mr. Arrigo) What happened then? A. I said, "Let's go down and talk to Mr. McClain."

Q. And did you? A. Yes.

Q. And then the three of you— A. Yes.

Q. What took place in the conversation with Mr. McClain? A. I asked Bruce Bart to repeat to McClain what he told me.

Q. And did he? A. He did.

Q. All right. Go ahead. [92] A. You want me to tell the whole conversation?

Q. Yes. Go ahead. A. He did and I said to Mr. McClain: "I don't like this. Why don't you go and get it straightened out." And he said he would. And I left the job.

Q. You left the job? A. Yes.

Q. McClain was working for Chloris on the site at the time? A. I would assume he was, yes. Chloris was pouring concrete.

Q. Now, Mr. Russell, who is the Job Superintendent for Wilmorite on the job site? A. Dennis Casey.

Q. Is he in charge of overall operations? A. Yes, he is.

Q. And approximately how many subs were working on the job, that day? A. I think there was about three at the time.

Q. Would you tell me the total number of Masons on the job that day? A. Thirteen or fourteen.

Q. And Mr. McClain worked as a Mason thereafter on the job site? A. I have no knowledge of such.

* * *

---

[227] JAMES BURKE, was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

Direct Examination:

Q. (By Mr. Hirsch) Your name is James Burke? A. That's correct.

Q. Where do you live, Mr. Burke? A. 28 Brookdale Avenue, Rochester, New York.

Q. You're married and have a family? A. Yes, I have.

[228] Q. And are you employed? A. Yes, I am.

Q. For whom are you employed? A. Bricklayers Union, Plasterers, Masons and Cement Finishers Local No. 11.

Q. You hold some sort of an office with the Local 11? A. Yes. I believe I'm known as a Business Manager or Business Agent.

Q. How long have you been the Business Agent of Local 11? A. Thirty-three years.

Q. And thirty-three years in this community? A. That is correct, sir.

Q. Do you know Eugene Mc Clain? A. Yes, I do.

Q. How long have you known him? A. Ever since he come in our Union.

Q. And when did he come into the Union? A. Around the middle 50's; 1952, 1953, somewhere in that area, I believe.

Q. And did there come a time when he was no longer a member of your Union? A. Yes.

Q. And when was that? A. That was several years ago.

Q. Do you know whether or not he was a member of your Union [229] on January 14, 1966? A. He was no longer a member of the Union on that date.

Q. When was he terminated as a member of your Union? A. Well, early—

Q. Approximately? A. Early January of 1966.

Q. Was he a member of the Union in October, 1965? A. Yes, he was.

Q. And do you recall the 21st day of October, 1965? A. Very well, yes.

Q. And did you have a conversation with Mr. Mc Clain on that day? A. Yes, I did.

Q. And were you acting in your capacity as the Business Agent? A. That is right, sir.

Q. Mr. Mc Clain was a member at that time? A. Yes.

Q. Where did you talk to Mr. Mc Clain on that day? A. On the Xerox project on Jefferson Road. The General Contractor was Wilmot. Jefferson Road is the address.

Q. What if anything happened to you on that day, very

briefly, when you had the conversation with Mr. Mc Clain? A. Well, what I remember most was being assaulted.

* * *

[230] Q. (By Mr. Hirsch) Subsequent to this assault, as you say, was there a Union meeting held pertaining to this assault? A. After the assault?

Q. After the assault? A. Yes, there was.

Q. At about what time—what date, I should say, was that meeting held? A. October 22nd.

Q. Now, you are familiar with the books and records of the Bricklayers, Union No. 11; isn't that right? A. Yes, I am.

Q. And you're familiar with the proceedings of the meeting which you have just stated? A. Yes, sir.

Q. On that date do you know whether or not at that meeting charges were filed against Mr. Mc Clain? A. They were.

Q. And were the charges acted upon? A. Could I explain?

Trial Examiner: Yes.

Q. (By Mr. Hirsch) Tell us in your own words what took place. A. The charges were acted on to this extent: the charges [231] were signed by three members of the Union against Mr. Mc Clain. They were read at the meeting. And the secretary was instructed to notify Mr. Mc-Clain to appear at the next meeting.

Q. And I have asked you prior to coming to this hearing to inspect the records of your Union; is that correct? A. That is correct.

Q. And based on that inspection, can you tell the Hearing Officer whether or not Mr. Mc Clain was notified of these charges?

* * *

The Witness: Mr. McClain was notified by registered mail by our secretary.

Trial Examiner: And, incidentally, these charges were based upon the altercation which occurred on October 21st, I take it?

The Witness: That is correct.

Trial Examiner: And were you the Signature—did you file one of the charges?

The Witness: No. The charges were filed after I reported [232] to the Union, by the President of our Union, and two witnesses who were there and witnesed the assault.

Trial Examiner: They filed the charges?

The Witness: That is correct, sir.

* * *

[234] Q. (By Mr. Hirsch) Now, did there come a time subsequent to the 21st day—let me put it this way; Did there come a time subsequent to October 1965, after McClain had been dropped from the Union, that there was a tender of dues by Mr. McClain to your Union? A. Yes, I believe he sent some money in or a check.

Q. A check? A. Yes.

Q. Was this money accepted by the Union? A. The secretary informed me that he returned the check because Mr. McClain had been dropped from our Union.

Q. Had Mr. McClain paid the fine at this time? A. No.

* * *

Q. (By Mr. Hirsch) Based upon the actions of the Union, the hearing and so forth pertaining to charges, was Mr. McClain fined? A. Yes, he was.

Q. And how much was he fined? [235] A. One thousand dollars.

Q. And that fine was reported also to your International? A. That is correct.

Q. All these proceedings were reported to your International? A. All of the original material involved in this case is in the hands of our International Union.

Trial Examiner: And he was dropped from membership at the same time; is that correct?

The Witness: No, no. That's why I said, your Honor,—the Constitution bears on a lot of things—

Mr. Hirsch: Just a minute.

Q. (By Mr. Hirsch) Was he dropped from membership at the same time? A. At his trial when he was fined?

Q. Yes. A. Definitely not, no, sir.

Q. Did there come a time subsequent to the trial that he was dropped from the rolls as a member of Local 11? A. He was dropped from the rolls of Local 11 thirty days or longer after his trial; I would say thirty-five to forty days after his trial.

Trial Examiner: When did his trial take place?

The Witness: His trial took place in October—sorry—November 12th, I believe.

Trial Examiner: And at that time he was fined one [236] thousand dollars?

The Witness: He was fined one thousand dollars.

Trial Examiner: And what was the action of his being dropped from the Union based upon thirty or thirty-five days thereafter?

The Witness: If a man does not pay a fine to the Union, he is given thirty days to pay that. If he does not pay it, he is dropped by the Local Union, regardless of his dues being paid right up to the—that month. Our Constitution provides that—

Mr. Hirsch: All right. That's based upon your Constitution?

The Witness: That is correct, sir.

Q. (By Mr. Hirsch) So at the time that you received the tender of dues from Mr. McClain, you said, the dues were sent back? A. He had already been dropped.

Q. He had been dropped? A. That is correct.

Q. And were the dues sent back because the fine wasn't paid at that time? A. The dues were sent back because he was a dropped member of our organization. No dues are accepted from anyone in our organization once he's dropped, period! Any member that's dropped, there's no dues accepted after he's dropped.

* * *

[238] CROSS EXAMINATION:

Q. (By Mr. Arrigo) Mr. Burke, then the reason why Mr. McClain was dropped from the Union was not because he didn't pay dues or anything of that nature; it's because he didn't pay the fine; is that correct? Can you answer "yes" or "no"? A. Repeat the question?

Mr. Arrigo: Would you read the question back, please.

(The pending question was read by the Reporter.)

The Witness: Yes.

* * *

SUPREME COURT, U. S.
No. 171
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In the Supreme Court of the United States

OCTOBER TERM, 1968

BRICKLAYERS, MASONS & PLASTERERS' INTERNATIONAL UNION OF AMERICA, LOCAL 11, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C., 20530.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

RONALD R. HELVESTON,
Attorney,
National Labor Relations Board,
Washington, D. C., 20570.

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OPINIONS BELOW

The court of appeals enforced the Board's order without opinion (Pet. App. 31). The Board's decision and order (Pet. App. 11-30) are reported at 162 NLRB No. 58.

JURISDICTION

The decree of the court of appeals was entered on March 11, 1968 (Pet. App. 31-32). The petition for a

writ of certiorari was filed on June 7, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that the union caused several employers to deny employment to Eugene McClain because his union membership had been terminated for failure to pay a union fine.

2. Whether substantial evidence supports the Board's finding that McClain was not a supervisor within the meaning of Section 2(11) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth at pp. 8-10 of the petition.

STATEMENT

Eugene McClain, a cement finisher, was a member of petitioner union from 1952 until December 1965, at which time he was dropped from membership for failing to pay a $1,000 fine imposed by the union. The fine was the result of an internal union proceeding initiated by charges alleging that McClain, after an argument with petitioner's business agent, James Burke, assaulted Burke with his fist (Pet. App. 17; B.A. 31-33, 85-89).[1] At a union meeting shortly after

[1] "B.A." refers to the Board Appendix in the court below, which is part of the record filed in this Court.

McClain was dropped from the union, business agent Burke instructed members to stop work any time McClain was employed on the same project with them (Pet. App. 21-23; B.A. 66-70).

On January 14, 1966, McClain reported for work at a job site where Wilmorite Construction Inc. was the general contractor and Chloris Associates Inc. a subcontractor (Pet. App. 17-18; B.A. 27).[2] Sometime thereafter, Wilmorite's general superintendent, Russell, learned from the mason superintendent that "there was a problem with the bricklayers" (Pet. App. 18-19; B.A. 50). Russell sought out petitioner's steward, Bruce Bart, who told Russell that "he had been in touch with the International and Local Union and that he was under orders to notify Wilmorite that [the bricklayers] would use the mortar that was on the job and work until noon, because McClain was on the job and he was no longer a member of the union" (Pet. App. 18-19; B.A. 50).

McClain was told to report to Russell, who asked him if he was having trouble with the union over his dues payments. To show that he was not delinquent McClain showed Russell his union book, which indicated that his dues had been paid through December 31.[3] Russell replied, "Well, something is wrong," and McClain suggested that he call Bart. When Bart ap-

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[2] Wilmorite and Chloris were parties to the collective bargaining agreement between the Building Trades Employers Association of Rochester and petitioner union. (Pet. App. 17-18; B.A. 27.)

[3] It is undisputed that the union allows its members a 60 day grace period in which to pay dues, and that McClain's January 25, 1966, tender of January dues was refused (Pet. App. 23; B.A. 35, 36, 45, 89, 90).

peared, McClain asked what the trouble was. Bart repeated the statement that he had made to Russell earlier and added that because McClain had not paid his fine, he could not work on the job. Bart, petitioner's steward at the site, then explained, "I am just doing my job." (Pet. App. 19-21; B.A. 34-35, 45, 50-51.) Russell thereupon asked McClain to leave the job until he got "straightened out" with the union. McClain left, and was not thereafter employed as a mason on that project (Pet. App. 20-21; B.A. 34-35, 52).

On January 25, 1966, McClain responded to the request of job superintendent Joseph Pannello that he report to another jobsite, where John Luther and Sons, Inc., was the general contractor (Pet. App. 24; B.A. 28-29).[4] When Kurt Keller, the steward for the union, observed McClain, he summoned the other masons on the job and told them: "Listen, McClain is on the job. Let's clean up the job and go in the shanty." Keller telephoned business agent Burke, and advised him of the action he had taken; Burke responded, "You did the right thing." (Pet. App. 24-25; B.A. 63-65.) When job superintendent Pannello learned that the masons had walked off the job, he asked Keller for an explanation, and Keller replied: "McClain is on the job. I took the masons off." Pannello then found McClain and told him: "You better leave the job to avoid a lot of this trouble." McClain then left that job site too (Pet. App. 25; B.A. 64, 55, 56).

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[4] As a member of the Building Trades Employers Association of Rochester, Luther was also a party to the previously mentioned collective-bargaining agreement with petitioner union (Pet. App. 24; B.A. 28-29).

On the basis of this evidence and other testimony in the record, the Board concluded that petitioner had violated Section 8(b)(2) and (1)(A) of the Act by causing Wilmorite and Chloris to discharge McClain, and by inducing Luther to refuse him employment, because his union membership had been terminated for failure to pay a union fine (Pet. App. 23-25, 27). The Board further found that McClain was an "employee," and not a "supervisor", within the meaning of Section 2(11) of the Act, and thus protected by the Act (Pet. App. 16-17). The Board's order requires the union to cease and desist from the unfair labor practices found; to notify the companies involved that it has no objection to the employment of McClain; and to make him whole for any net loss of pay he may have suffered as a result of the discrimination against him (Pet. App. 11-12, 27-30). The court of appeals sustained the Board's findings and enforced its order (Pet. App. 31-32).

ARGUMENT

1. There is no substance to petitioner's primary contention (Pet. 5) that the Board's decision "proscribes the enforcement of internal, union discipline against a member * * *." Neither the Act nor the Board's decision would bar the union from disciplining McClain for failure to pay the fine imposed by the union so long as no attempt is made to affect his job rights. See *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175. The "policy of the Act is to insulate employees' jobs from their organizational rights" (*Radio Officers' Union* v. *National La-*

bor Relations Board, 347 U.S. 17, 40), and the Act accordingly provides that it is an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against an employee on the ground that his union membership has been terminated for any reason other than failure to tender ordinary periodic dues. Section 8(b)(2) (Pet. App. 9).[5] Thus, it is clear that a union, like petitioner, is forbidden to induce an employer to discriminate against an employee in order to compel compliance with some other union rule or policy relating to the acquisition or retention of membership. *National Labor Relations Board* v. *Industrial Union of Marine and Shipbuilding Workers*, No. 796, October Term, 1967, decided May 27, 1968; *Radio Officers' Union*, *supra*, 347 U.S. at 40-42; *National Labor Relations Board* v. *Spector Freight System*, 273 F. 2d 272 (C.A. 8), certiorari denied, 362 U.S. 962. Accordingly, the only issue genuinely presented is whether there is sufficient evidence to support the Board's finding, sustained by the court below, that the union caused McClain to be denied employment because his union membership had been terminated for failure to pay a union fine. Such an evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-

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[5] This exception is permitted only when there is a valid union security agreement in effect and the member has failed to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. The Board found that McClain was not delinquent in these payments (*supra*, p. 3).

491. In any event, the facts summarized in the Statement (*supra*, pp. 2-5) show that there is ample support in the record as a whole to sustain the Board's finding.[6]

2. Contrary to petitioner's additional contention (Pet. 6-7), the Board and the court below did not misinterpret Section 2(11) of the Act in holding that McClain was not a supervisor. Section 2(11) of the Act defines a "supervisor," who is excluded from the Act's coverage, as:

> any individual having authority * * * to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Board correctly applied those criteria here, and the record fully supports its conclusion, sustained by the court below, that McClain did not possess the authority and independent judgment required to make him a supervisor within the meaning of Section 2 (11).

Thus, while there is testimony that McClain on occasion was assigned to "oversee" a job when William

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[6] The Board's finding does not rest wholly upon "circumstantial evidence" (see Pet. 5-6). But, even if it did, this would not render it invalid. See *F. W. Woolworth Co.* v. *National Labor Relations Board*, 121 F. 2d 658, 660 (C.A. 2).

Wilson, the president of Chloris, was temporarily off the job site (Pet. App. 16-17; B.A. 59-60), McClain's function on these occasions was limited to routine direction of the work, such as telling the men where to start. Of the five to eight masons employed by Chloris, at least three others were directed by Wilson to oversee jobs in the same manner (Pet. App. 16-17; B.A. 46, 59, 60). Furthermore, when McClain or any of the other three "oversee" a job, they are still subject to Wilson's direction and exercise no independent discretion: "I tell them what to do and they go ahead and do it" (B.A. 60). Thus, even if the overseeing could be considered assigning or responsibly directing employees, it is clear that McClain was not authorized to make independent judgments.[7] In addition, McClain was paid the same hourly rate as that fixed by the collective bargaining agreement for the other masons (Pet. App. 16-17).

In cases like this, "the decisive question is whether [the individuals involved] have been found to possess authority to use their independent judgment with respect to the exercise by them of some one or more of the specific authorities listed in Section 2(11) of the Act." *National Labor Relations Board* v. *Brown & Sharpe Mfg. Co.*, 169 F. 2d 331, 334 (C.A. 1). Apart from the routine direction of work described above,

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[7] The exercise of some supervisory tasks in a merely "routine", "clerical", "perfunctory", or "sporadic" manner does not elevate a rank and file employee to a supervisor. See *National Labor Relations Board* v. *Cousins Associates, Inc.*, 283 F. 2d 242, 243-244 (C.A. 2); *Poultry Enterprises, Inc.* v. *National Labor Relations Board*, 216 F. 2d 798, 801-802 (C.A. 5); *National Labor Relations Board* v. *Overnite Transportation Co.*, 308 F. 2d 284, 289-290 (C.A. 4).

not materially different in responsibility from the task performed by the "lead men" on any work crew, nothing in the record indicates that McClain possessed any of those powers. Indeed, the president of the Chloris firm testified that McClain did not have the authority to fire employees (Pet. App. 16-17; B.A. 58; 59), and he replied with an emphatic, "No, no", when asked if there were any other supervisors employed by the company besides himself.[8] In this context, there can be no serious doubt that the Board was warranted in concluding that McClain was an "employee" rather than a "supervisor", and thus entitled to the protection of the Act.

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[8] This portion of Wilson's testimony, which was inadvertently omitted from the printed appendix, is as follows:

* * * *

[121] WILLIAM WILSON

CROSS EXAMINATION

TRIAL EXAMINER: Do you have any other regular Supervisors—strike that. Besides yourself, do you have any other Supervisors employed by your Company or for them?

THE WITNESS: No, no. No foreman, no.

CONCLUSION

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

RONALD R. HELVESTON,
Attorney,
National Labor Relations Board.

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